91-801

Supreme Court, U.S.
FILED
OCT 11 1991
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

TERM

OCTOBER 1991

MALCOM KENNETH CREAMER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

M. Kenneth Creamer, Pro Se
21 Dover Dr.
Endicott, N.Y. 13760
(607)754-4026

QUESTIONS PRESENTED FOR REVIEW

Do the United States Federal Courts have jurisdiction or statutory basis to enter judgment for alleged unpaid taxes where no statute, facts or valid assessments were pleaded in the original complaint or in any subsequent answers to defendant's Motion's to Dismiss showing that the defendant was the person liable for the taxes alleged and/or a Statutory Taxpayer.

AND

If yes, does not Petitioner have a right to be informed either by the Courts below or in the Government's pleadings as to what facts in the record and/or law made him the person liable for the alleged taxes or otherwise made him a Statutory Taxpayer.

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REFERENCE TO OPINIONS BELOW

United States District Court for the Northern District of New York - Case No. 88-CV-752 Final Order issued by Hon. Bernard A. Friedman

United States court of Appeals for the Second Circuit - Case No. 91-6074 Hon. Ralph K. Winter, Hon Frank X. Altimari, Hon. J. Daniel Mahoney Presiding.

Judgment was entered on the 29th day of July, 1991

This Petition is made pursuant to 28 U.S. C. 1254

This Petition relies in part on Amendments VI, IX, X, XIII, and Article I, Section 8, Clause 17 of the Federal Constitution.

Jurisdiction for the Court in the first instance is an issue in this case.

STATEMENT OF THE CASE

Respondent brought a civil action in the District Court asking the Court to reduce to judgment various computer generated alleged assessments based on "substitute returns" for the years 1976 through 1984, to overturn or set aside the sale of property by Defendant to Defendant's Spouse as fraudulent conveyances, and to foreclose on said property claiming valid tax liens. A settlement was negotiated on January 9, 1991 by the Honorable Bernard A. Friedman, U. S. District Judge Sitting by Special Designation and the Final Order was filed July 24, 1991 wherein all issues of law were preserved for appeal to the Court of Appeals for the Second Circuit.

On July 29, 1991 the Court of Appeals denied the appeal citing Ficolora v. Commissioner, 751 F. 2d 85 (2nd Cir.

1984), Coleman v. Commissioner, 791 F. 2d 68 (7th Cir. 1986), and Schiff v. Commissioner, 751 F. 2d 116, 117(2d Cir. 1984). (APP 1,2)

STATEMENT OF THE FACTS

For the years 1976 through 1984 Petitioner M. Kenneth Creamer was employed by IBM in the State of New York as an unlicensed unenfranchised engineer engaged in the design of computers. At no time during these years was the Petitioner engaged in any revenue taxable activities either within the State of New York or within any Federal Enclave within the State of New York or any other State. No tax "returns" were filed during these years upon which an assessment could lawfully be made.

In 1984, Petitioner was convicted of a violation of 26 U.S. 7203. However, in a recent ruling in Cheeks v. U.S., 89-658 (1-8-91) this Court overturned a conviction for similar offenses wherein the lower Court gave precisely the same

erroneous jury instructions as were given in the case against Petitioner.

In addition the trial judge admittedly stated at the sentencing that "I am convinced that you believe that your understanding of the law is correct but you are wrong ... and you must be punished."

In 1986 a Delegate of the Secretary of the Treasury filed a substitute "return" with all zero's for the purpose of instigating a collection process.

Petitioner did not apply to the Tax Court for review.

Nowhere at any time or in any manner has Petitioner been informed by any representative or delegate of Respondent that he is or has been made liable for any Internal Revenue Tax imposed by Title 26.

ARGUMENT

Petitioner believes that the original complaint and subsequent answers to Petitioners challenges to said complaint fail to state a valid claim upon which relief can be granted and that the District Court did not have jurisdiction to proceed absent a clear showing that Petitioner was in fact the person liable for the alleged taxes.

Petitioner further believes that the cases cited by the Second Circuit are distinguished in this case in that in each case cited the defendant(s) either made application to the Tax court or sign a form 1040 for the years in question. No such evidence of taxpayer status exist in this instant case that Petitioner is aware.

Petitioner is not here arguing that

taxpayers should not pay taxes. Instead, Petitioner argues that without pleadings showing prima facia evidence that Petitioner is Statutory Taxpayer for Federal Taxes, he is unable to mount a defense to the contrary; and if the Science of Law permits the courts to take judicial notice of facts and law not in the pleadings, Petitioner is left to guess what conditions bestowed "taxpayer status" upon him.

Petitioner relies very heavily on this Court's rulings in asking for this review. It starts with

> A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution.
> Murdock v. Pennsylvania, 319 U.S. 105, at 113 (1943)

That the right to the fruits of ones labor is born out with the following:

> The right to labor and to its protection from unlawful interference is a constitutional as well as a common-law right.

> Every man has a natural right to the fruits of his own industry.
> 48 Am Jur 2d, Section 2 Page 80.

Very early in this country's history stated this Court stated:

> "The power to tax involves the power to destroy."
> McCullock v. Maryland, 4 Wheat. 316;
> Crandall v. Nevada, 6 Wall 35, 46

Since Congress does not possess the power to destroy the very source of its own power, namely the people, it does not have the power to tax life blood of the people as they strive to support their own life and their families through their own industry so long as such industry is lawful and is undertaken without franchise or privilege.

Congress is on record as defining the income tax as an excise or privilege tax.

> The income tax is, therefore, not a tax on income as such. It is an excise tax with

> respect to certain activities and privileges which is measured by reference to the income which they produce. The income is not the subject of the tax: it is the basis for determining the tax. (4) House Congressional Record, March 27, 1943, page 2580.

This is in line with an earlier Supreme Court decision wherein the Court said:

> Excises are "taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges." Cooley, Const. Lim., 7th ed., 680
> Flint v. Stone Tracy Co., 220 U.S. 107, 151 (1911)

Although the following is a quote from the Tennessee Supreme Court, Defendant-Petitioner believes that given the right facts and the right question before it this Court would make a similar statement.

> It cannot be denied that the Legislature can name any privilege a taxable privilege

> and tax it by means other than an income tax, but the Legislature cannot name something to be a taxable privilege unless it is first a privilege.
>
> Realizing and receiving income or earnings is not a privilege that can be taxed
>
> "A Privilege is whatever business, pursuit, occupation, or vocation, affecting the public, the Legislature chooses to declare and tax as such." Corn et al. v. Fort, 170 Tenn. 377, 385, 95 S.W. 2d 620, 623, 106 A.L.R. 647.
>
> Privileges are special rights, belonging to the individual or class, and not to the mass; properly, an exemption from some general burden, obligation or duty; a right peculiar to some individual or body." Lonas v. State, 50 Tenn. 287, 307
>
> Since the right to receive income or earnings is a right belonging to every person, this right cannot be taxed as a privilege.
> Jack Cole Co. v. MacFarland, 337 S.W. 2d 453, 455-456 (Tenn. 1960) (Emphasis added)

Similarly, other states have rendered decision which Defendant-Petitioner believes are also not inconsistent with the Supreme Court of the United States.

> The individual, unlike the corporation, cannot be taxed for the mere privilege of existing. The corporation is an artifi-

> cial entity which owes its existence and charter powers to the state; but the individuals' rights to live and own property are natural rights for the enjoyment of which an excise cannot be imposed. Redfield v. Fisher, 292 P. 813, at 819 (1930)

See also Hale v. Henkel, 201 U.S. 43 (1906)

> "The legal right of a taxpayer to decrease the amount of what would otherwise be his taxes, or altogether avoid them. by whatever means within the law permits, cannot be doubted.
> Gregory v. Helvering, 293 U.S. 465.

Since Congress has provided no statutory means of volunteering out of the income tax system, only a means to volunteer in, the citizen must look to the courts to discover how to restore their nature rights to function without Government intervention. Petitioner believes that if the District Court did in fact have jurisdiction to proceed at the outset, rulings and/or opinions

should have so designated.

There can be no doubt that the existence of a signed form 1040 is legal evidence of contract making the person who signed the form liable for the tax. The signed form 1040 also provides a statutory basis upon which a legal tax assessment can be made. However, there is no signed form 1040 in this case and there is no statute granting the Secretary of the Treasury authority to make a lawful assessment. Therefore, Petitioner believes he is not liable in this case to pay any alleged tax created by fiat administrative process absent statutory authority.

> Since the Statutory definition of "taxpayer" is exclusive, the federal courts do not have the power to create non statutory taxpayers for the purpose of applying the provisions of the revenue acts; ... C.I.R. v. Trustees of L. Inv. Ass'n., 100 F2d at 29 (1938)

Similarly:

> The revenue laws are a code or system in regulation of tax assessments and collection. They relate to taxpayers, and not to nontaxpayers. The latter are without their scope. No procedure is prescribed for nontaxpayers, and no attempt is made to annul any of their rights and remedies in due course of law. With them Congress does not assume to deal, and they are neither of the subject nor of the object of the revenue laws.
> Long v.Rassmussen, 281 F. 236, at 238 (1922)
> Economy Plumbing and Heating v. U.S., 470 F.2d 585, at 589 (1972)

In order for Respondent to have had a valid cause of action, Petitioner believes that he must have shown or alleged the enabling statute that defined Petitioner, engaged in thus and so activities was in fact the person liable for an Internal Revenue Tax.

Respondent stated in his complaint that tax assessments were made "according

to law." This is simply not true. "Substitute returns" were entered into a computer for the express purpose of determining a deficiency. This procedure has been deemed unlawful by the United States Tax Court.

> We cannot accord the status of a "return" to a form filed simply to facilitate respondent's processing procedures. See sec. 301.6020-1(b)(1) and 301.6020-1(b)(2), Proced. & Admin. Regs. Phillips v. Commissioner, 86 T.C. 433, 437-438.

Petitioner believes Respondent is duty bound to show this Court AND Petitioner what enabling statute or evidence caused Petitioner to be made liable for an income tax imposed by the Internal Revenue Code.

In a more recent case the Ninth Circuit had this to say about liability.

> Tax liability is a condition precedent to the demand. Merely demanding payment, even repeatedly, does not cause liability.

> For the condition precedent of liability to be met, there must be a lawful assessment, either a voluntary one by the taxpayer or one procedurally proper by the IRS. Because this country's income tax system is based on voluntary self-assessment, rather than distraint, Flora v. U.S., 362 U.S. 145, 176, 80 S.Ct. 630, 646-7, 4 L.Ed/2d 623 (1960), the Service may assess the tax only in certain circumstances and in conformity with proper procedures.
> Bothke v. Fluor Engineers and Constructors, Inc., 713 F.2d 1405 (1983)

Little needs to be added to the above citations to support Petitioner's conclusion to this argument. Certainly the Petitioner's liability for a tax does not clearly appear in this case. Also, Petitioner has not voluntarily created a lawful assessment nor has the Service made a procedurally proper assessment under statutory authority. The liability for a tax cannot be presumed to exist without legal assertions to support the presumption.

Petitioner believes that under the

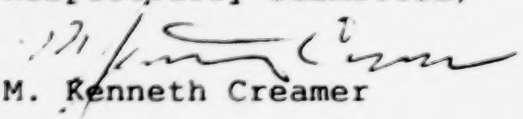
doctrines set forth in Fort Leavenworth R. R. v. Lowe, 114 U.S. 525 (1885) and Adams v. United States, 319 U.S. 312 (1943) limiting federal legislative jurisdiction, the federal government is required to prove jurisdiction when challenged.

> "Once Jurisdiction is challenged, it must be proven."
> Hagens v. Lavine, 415 U.S. 533

CONCLUSION

Petitioner believes that for the reasons stated above the lower courts were in error for denying Petitioner's Motions to Dismiss for lack of a valid claim and his Motion to Dismiss for Lack of Federal Legislative Jurisdiction and for the lower courts failure to inform Petitioner what facts and law, if any, made Petitioner liable for taxes alleged in the original complaint, this court should grant this Petition for Writ of Certiorari.

Respectfully Submitted,



M. Kenneth Creamer

CERTIFICATE OF SERVICE

STATE OF NEW YORK)
) SS:
COUNTY OF BROOME)

I, M. Kenneth Creamer, certify that a copy of the Petition for Writ of Certiorari and all associated papers was delivered to the Solicitor General by mail in a prepaid postage envelope at Department of Justice, Washington, D.C. 20530

Signed,

M. Kenneth Creamer

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At the stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of July, one thousand nine hundred and ninety-one.

Present:

Honorable Ralph K. Winter,
Honorable Frank X. Altimari,
Honorable J. Daniel Mahoney,
Circuit Judges.

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

ORDER
91-6074

MALCOLM K. CREAMER (sic),
DONNA J. CREAMER, and
THE BINGHAMTON SAVINGS BANK,
Defendants,

MALCOLM K. CREAMER (sic),
Defendant-Appellant.

Appeal from the United States Dis-

trict Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District court be and it hereby is affirmed.

Malcolm K. Creamer, (sic) pro se, appeals from an order of the district court, entered on April 1, 1991, denying his motion to dismiss for lack of legislative jurisdiction. He argues that he is not liable for federal income taxes because no enabling statute creating such liability exists because he has not entered into a specific contractual agreement with the federal government to

pay such taxes. These arguments are frivolous. See 26 U.S>C. Sec 61, 63 (1988); Coleman v. Commissioner, 791 F. 2d 68 (7th Cir. 1986); Ficolora v. Commissioner, 751 F. 2d 85 (2d Cir. 1984), cert. denied, 471 U.S. 1005 (1985). He also argues that, because he did not submit any tax returns for the years in question, his tax liability cannot be assessed. This argument is equally frivolous. See Schiff v. Commissioner, 751 F. 2d 116, 117 (2d Cir. 1984). Accordingly, we affirm the judgment of the district court. The appellee's motion for sanctions is denied.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

Signed
Hon Ralph K. Winter, U.S.C.J.

Signed
Hon. Frank X. Altimari, U.S.C.J.

Signed
Hon. J. Daniel Mahoney, U.S.C.J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
SYRACUSE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MALCOM KENNETH CREAMER,
DONNA J. CREAMER, and
THE BINGHAMTON SAVINGS BANK,

Defendants.

Civil Action No.
88-CV-752

HON. BERNARD A. FRIEDMAN

FINAL ORDER

On January 9, 1991, the court held a final pretrial conference in this matter pursuant to Fed. R. Civ. P. 16. At that conference, the parties entered into a settlement agreement, the terms of which were placed on the record. A few days prior to this conference, defendant Malcom Kenneth Creamer filed a Motion to Dismiss for Lack of Legislative Jurisdiction, which the court denied on the

record. Defendant Malcom Kenneth Creamer indicated that his consent to the terms of the settlement agreement was contingent on his right to appeal the court's denial of his motion to dismiss. All parties understood that the settlement agreement could not be enforced unless (1) defendant Malcom Kenneth Creamer failed to appeal the denial of his motion to dismiss, or (2) an appeal of the court's denial of the motion to dismiss is unsuccessful. Accordingly,

IT IS ORDERED that defendant Malcom Kenneth Creamer's Motion to Dismiss for Lack of Legislative Jurisdiction is denied. This is a final decision within the meaning of 28 U.S.C. Sec. 1291.

SO ORDERED

Signed
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE
SITTING BY SPECIAL DESIGNATION

Dated: March 28, 1991

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Plaintiff

vs.

MALCOLM KENNETH CREAMER,
DONNA J. CREAMER. and
THE BINGHAMTON SAVINGS BANK,

Defendants.

Civil Action No.
88-CV-752

HON. BERNARD A. FRIEDMAN

JUDGMENT

Judgment is hereby entered in this matter in accordance with the terms of the settlement agreement, which were placed on the record on January 9, 1991.

GEORGE A. RAY
CLERK OF COURT

By: Linda M. Payne
Deputy Clerk

Approved: Unsigned
Bernard A. Friedman
U.S. District Judge
Sitting By Special Designation

Time Stamped July 24, 1991